

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT RICHARDS,

Plaintiff-Appellant,

v

APV NORTH AMERICAN, INC, and LIFE INS
CO of NORTH AMERICA,

Defendants-Appellees.

UNPUBLISHED

January 18, 2007

No. 262752

Kent Circuit Court

LC No. 02-001584-CK

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

In this suit to recover benefits under short-term and long-term disability plans, plaintiff appeals as of right from the trial court's opinion and order affirming the decisions of the plan administrators. We affirm.

Plaintiff worked for defendant APV North America, Inc. (APV) for approximately fourteen years. In February 2001, plaintiff began a disability leave of absence from APV. Under the terms of a short-term disability (STD) plan, APV paid plaintiff for 40 hours per week at \$19.04 per hour for the first three months of his leave of absence. For the next three months, APV paid plaintiff 60% of that amount. After the passage of six months, plaintiff's coverage under the STD plan ended. Plaintiff then began to receive benefits under a long-term disability (LTD) plan that APV had with defendant Life Insurance Company of North America (LINA). LINA paid defendant 60% of his monthly salary, which it also calculated at \$19.04 per hour for a standard 40-hour workweek.

Plaintiff objected to the amount of benefits paid by both APV and LINA. Plaintiff contended that under both plans, his benefits should have been based on his "road rate" of \$26.10 per hour rather than his "shop rate" of \$19.04 per hour. Both defendants concluded that plaintiff's benefits were properly based on his base rate of pay, which they determined was \$19.04 per hour. In February 2002, plaintiff sued defendants to recover the benefits he claimed were owed under the disability plans.

In December 2004, the trial court issued an opinion and order concerning LINA's decision to base plaintiff's LTD benefits on a pay rate of \$19.04 per hour. In the opinion, the trial court stated that the LTD plan granted LINA the discretion to determine eligibility for benefits. Because the plan granted LINA the discretion to determine eligibility for benefits, the

trial court determined that it must affirm LINA's decision unless that decision was arbitrary and capricious. The trial court then noted that there was a reasonable basis for LINA's determination that, as defined under the LTD plan, plaintiff's base rate of pay was \$19.04 per hour. For this reason, the trial court concluded that LINA's decision was not arbitrary and capricious and must be affirmed. The trial court did not directly address plaintiff's claim against APV in its December opinion and order. However, in April 2005, the trial court entered an order granting judgment in favor of APV based on a stipulation between APV and plaintiff.

This appeal followed.

We shall first address plaintiff's contention that the trial court failed to properly apply the applicable federal standards of review to plaintiff's challenge of LINA's decision to base his benefits under the LTD plan on a pay rate of \$19.04 per hour.¹

Although plaintiff's complaint did not allege claims under the Employee Retirement Income Security Act (ERISA), 29 USC 1001, *et seq.*, the parties and the trial court correctly concluded that plaintiff's claims were governed by ERISA's civil enforcement provisions. See 29 USC 1132(a)(1)(B). "The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive pre-emption provisions, see ERISA § 514, 29 USC 1144, which are intended to ensure that employee benefit plan regulation would be 'exclusively a federal concern.'" *Aetna Health, Inc v Davila*, 542 US 200, 208; 124 S Ct 2488; 159 L Ed 2d 312 (2004), quoting *Alessi v Raybestos-Manhattan, Inc*, 451 US 504, 523; 101 S Ct 1895; 68 L Ed 2d 402 (1981). The pre-emptive force of ERISA is of such extraordinary power that it "'converts an ordinary state common law complaint into one stating a federal claim . . .'" *Id.* at 209, quoting *Metropolitan Life Ins Co v Taylor*, 481 US 58, 65-66; 107 S Ct 1542; 95 L Ed 2d 55 (1987).

A challenge to an administrator's denial of benefits under 29 USC 1132(a)(1)(B) is normally to "be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co v Bruch*, 489 US 101, 115; 109 S Ct 948; 103 L Ed 2d 80 (1989). The LTD plan applicable to plaintiff states that LINA will begin to pay benefits under the plan when it receives "due proof" that the employee became totally disabled and that his disability has continued for a period longer than the applicable waiting period.² Based on this language, the trial court determined that the plan granted LINA the authority to determine eligibility for benefits. Therefore, it concluded that the deferential arbitrary and capricious standard of review applied. We agree.

¹ We note that plaintiff has not challenged the trial court's grant of summary judgment in favor of APV. Indeed, each of plaintiff's arguments are framed by reference to actions taken by LINA in the administration of the LTD plan and the trial court's review of that decision. Therefore, the propriety of the trial court's decision to grant judgment in favor of APV is not before this Court.

² Although there was initially some confusion about which of two possible LTD policies applied to plaintiff, after a remand by the trial court, LINA determined that the plan with policy number LK-5419 applied. Plaintiff does not dispute this determination on appeal.

In determining whether the arbitrary and capricious standard of review applies, the focus is on the breadth of the authority granted by the plan to the administrator. *Perez v Aetna Life Ins Co*, 150 F3d 550, 555 (CA 6, 1998) (en banc).³ “While ‘magic words’ are unnecessary to vest discretion in the plan administrator and trigger the arbitrary and capricious standard of review, this circuit has consistently required that a plan contain ‘a *clear* grant of discretion [to the administrator] to determine benefits or interpret the plan.’” *Id.*, quoting *Wulf v Quantum Chem Corp*, 26 F3d 1368, 1373 (CA 6, 1994). In *Perez* the court concluded that the plan administrator had discretion to determine eligibility and construe plan terms because the plan provided that the administrator “shall have the right to require as part of the proof of claim satisfactory evidence . . . that [the claimant] has furnished all required proofs for such benefits.” *Id.* at 555 (emphasis removed). The *Perez* court explained that, “the plan clearly grants discretion to [the administrator] because, under the only reasonable interpretation of the language, [the administrator] retains the authority to determine whether the submitted proof of disability is satisfactory.” *Id.* at 557.

In the present case, the plan indicates that the administrator will begin paying benefits after receiving “due proof” that the employee is totally disabled and that the total disability has lasted the requisite period of time. *Random House Webster’s College Dictionary* (1992) defines “due” to mean “adequate” or “sufficient.” In this context, the use of “due proof” indicates a level of subjective assessment regarding the proof necessary to trigger the payment of benefits. Hence, under the plain terms of the plan, LINA retains the authority to determine what constitutes adequate proof of an employee’s total disability. This grant of discretion is sufficient to trigger the arbitrary and capricious standard of review. *Firestone, supra* at 115; see also *Patterson v Caterpillar, Inc*, 70 F3d 503, 505 (CA 7, 1995) (“The Caterpillar Plan provides that ‘benefits will be payable only upon receipt by the Insurance Carrier or Company of . . . due proof . . . of such disability.’ This language is similar to provisions that we previously have held sufficient to apply the arbitrary and capricious standard of review.”).⁴ Therefore, the trial court applied the correct standard of review.

We shall next address plaintiff’s argument that the trial court erred when it affirmed LINA’s determination under the arbitrary and capricious standard.

³ We note that this Court is normally not bound by decisions of the lower federal courts on matters of federal law. *Arbela v General Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004). However, given ERISA’s preemptive force, *Aetna Health, Inc, supra* at 208, and the fact that federal courts are charged with developing a federal common law applicable to ERISA claims, see *Firestone, supra* at 110, we believe that it is appropriate to rely on lower federal court decisions that construe the law applicable to ERISA claims.

⁴ We disagree with plaintiff’s contention that the language of the present plan is similar to that found in *Hoover v Provident Life & Accident Ins Co*, 290 F3d 801 (CA 6, 2002). The plan language at issue in *Hoover* did not require “satisfactory” or “due” proof of disability, but only required “proof of loss.” *Id.* at 808. Based on that language, the court determined that the plan did not commit benefit eligibility determinations to the discretion of the administrator. *Id.* Because the plan at issue requires “due proof” rather than just “proof of loss,” *Hoover* is inapplicable to the facts of this case.

This Court reviews de novo whether the trial court applied the proper standard of review to the decision of the administrator. *Hoover v Provident Life & Accident Ins Co*, 290 F3d 801, 807 (CA 6, 2002). Having determined that the trial court applied the proper standard of review, this Court will review the administrator's decision under the same legal standard. *Glenn v MetLife*, 461 F3d 660, 665 (CA 6, 2006). Under the arbitrary and capricious standard, this Court will "uphold the administrator's decision 'if it is the result of a deliberate, principled reasoning process and if it is supported by substantial evidence.'" *Id.* at 666, quoting *Baker v United Mine Workers of Am Health & Ret Funds*, 929 F2d 1140, 1144 (CA 6, 1991).⁵

In the present case, the plan applicable to plaintiff states that it will pay a monthly benefit to an employee equal to 60% of the employee's monthly basic earnings at the time he becomes totally disabled. An employee's basic earnings are defined as the "Employee's rate of pay reported by the Employer (including the Employee's most recent bonus) as of May 1st of each year. It does not include overtime."⁶ Based on numerous reports submitted by plaintiff's employer, LINA determined that plaintiff's rate of pay was \$19.04 per hour at the time he became disabled. Because this determination is based on a principled reading of the applicable plan language and is based on reports submitted by plaintiff's employer that stated that plaintiff's base rate of pay was \$19.04 per hour rather than his \$26.10 per hour "road rate," we cannot conclude that the plan administrator's decision was arbitrary and capricious.

In addition, we reject plaintiff's contention that the trial court's decision should be reversed because it failed to consider LINA's conflict of interest as the administrator of the plan and the party obligated to pay benefits. See *Firestone, supra* at 115. Whether there is a conflict of interest is just one of the factors to be considered in assessing whether the administrator's decision was arbitrary and capricious. *Id.* Given the totality of the evidence and the plain language of the plan, we cannot conclude that LINA's decision was actually affected by the potential conflict of interest. See, e.g., *Peruzzi v Summa Medical Plan*, 137 F3d 431, 433 (CA 6, 1998). Therefore, even if the trial court erred on this basis, the error would not warrant reversal.

Plaintiff also argues that the trial court erred by failing to apply the language of the plan summary provided to plaintiff rather than the actual language of the plan. See *Helwig v Kelsey-Hayes Co*, 93 F3d 243, 247-248 (CA 6, 1996) (noting that where the language of plan conflicts with the summary plan description provided to the employee, the summary plan description controls). However, plaintiff failed to properly raise this issue before the trial court. Therefore,

⁵ We do not agree with plaintiff's contention that the trial court committed error warranting reversal when it failed to review the administrator's factual findings de novo. As noted, the trial court correctly applied the arbitrary and capricious standard of review to LINA's decision. Under this standard, the administrator's decision must be supported by substantial evidence. *Glenn, supra* at 666. Furthermore, plaintiff fails to explain how the trial court's purported failure to review the administrator's factual findings de novo resulted in error warranting reversal. Therefore, we conclude that plaintiff has abandoned this issue on appeal. See *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 173; 721 NW2d 233 (2006).

⁶ The record actually contains three amendments potentially applicable to the plan at issue, which define basic earnings. However, the definitions are substantially similar.

we decline to address it. See *Harbour v Correctional Med Services, Inc*, 266 Mich App 452, 468-469; 702 NW2d 671 (2005). Even if this argument had been properly preserved below, we would conclude that the language of the summary plan description does not directly conflict with the plan language. The summary plan description, which plaintiff claims applies, states, “‘Basic earnings’ are defined as your base salary plus any bonuses you earn. Each May 1st, your basic earnings for plan purposes are updated to reflect your annual earnings during the previous calendar year. Basic earnings do not include any overtime pay you may receive.”⁷ By noting that basic earnings are equal to the employees “base salary” and do not include overtime, the description clearly indicates that an employee’s actual earnings might be different than his basic earnings. Hence, the reference to “annual earnings” could refer to “annual earnings” at the employee’s base salary. Therefore, LINA’s determination that plaintiff’s benefits should be based on a pay rate of \$19.04 is not necessarily inconsistent with the summary plan description.

Because LINA’s decision to base plaintiff’s benefits on a pay rate of \$19.04 per hour was based on a principled reading of the plan language and was supported by substantial evidence, its decision was not arbitrary and capricious. Therefore, the trial court did not err when it affirmed LINA’s decision.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly

⁷ We note that only one partially legible page of the document plaintiff claims constitutes the applicable summary plan description appears in the administrative record. Because a portion of that page is cutoff, we have used the quote provided in plaintiff’s brief to fill in the missing language.